

MUNICIPALITY OF ANCHORAGE  
MEMORANDUM

DATE: October 6, 1989  
TO: James E. Ramsey, Deputy Municipal Attorney  
FROM: Kevin Finnigan, Assistant Municipal Attorney *KF*  
SUBJECT: Election Contest -- Inadequate Ballot Supply

BACKGROUND

The Municipality held an election on October 3, 1989. The issues presented to the voters included the election for several Assembly seats, several propositions including the sale of ATU and the imposition of a tax on tobacco products, and other issues. The Municipal Clerk ordered ballots for the election based on votes cast in past elections. Prior to the election, the ballot propositions dealing with the sale of ATU and the imposition of a tobacco tax were the subject of wide advertisement which resulted in increased voter turnout. The increased voter turnout was not anticipated and the supply of ballots was not adequate to accommodate all of the voters. Several districts ran out of ballots toward the end of the election voting hours. Election officials at the polling booths used a variety of methods to permit voters to cast votes. Some voters were offered sample ballots to use to cast their vote. Others were given xeroxed copies of a ballot to cast their vote. Some voters may have been given sheets of paper on which to cast their vote. The inadequate supply of ballots caused delays at some of the polling areas. At some polling areas, delays of two hours or more developed as voting officials attempted to obtain ballots or substitutes for ballots to allow voters to cast their votes. Some voters may have been discouraged by the delays caused by the lack of ballots and left the voting areas without voting rather than wait for substitute ballots to arrive. Newspaper reports indicate that some voters were turned away by election officials because of the inadequate supply of ballots.

ISSUE

You have asked whether the above scenario invalidates all or part of the October 3 election and requires a new election to be held.

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SHORT ANSWER

If voters were refused the opportunity to vote, this may invalidate the election or part of the election if it can be demonstrated that the disenfranchised voters would have changed the result of the election.

DISCUSSION

Alaska Constitution Article V, Section 3, Methods of Voting; Election Contest, requires that methods of voting and the procedure for determining election contests be prescribed by law. AS 29.26.010 requires the governing body of municipal governments to prescribe rules for conducting an election. AS 29.26.070 permits the governing body of a municipal government to provide by ordinance for the time and procedure for the contest of an election. The Municipality has enacted AMC 28.100.010, Grounds for Election Contest to Establish the Grounds for an Election Contest. AMC 28.100.010 states:

A candidate or ten qualified voters may contest the election of any person or the approval or rejection of any question or proposition upon one or more of the following grounds:

- A. malconduct, fraud or corruption on the part of an election official sufficient to change the result of the election;
- B. the person certified as elected is not qualified as required by law;
- C. any corrupt practice as defined by law sufficient to change the result of the election.

The Alaska Supreme Court in Hammond v. Hickel, 588 P.2d 256 (Alaska 1978) interpreted the State of Alaska's election contest statute. AS 15.20.540 provides the identical grounds for election contests as that contained in AMC 28.100.010. There is no suggestion that the October 3 election involved fraud, corruption or any corrupt practice which would provide a ground for contesting the election. The possibility of voters being turned away for insufficient ballots does, however, raise the question of whether malconduct on the part of an election official was sufficient to change the result of the election.

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The Alaska Supreme Court in Hammond has provided a test for both "malconduct" and when malconduct is sufficient to change the result of an election. Malconduct exists when a deviation from a statutorily or constitutionally prescribed norm creates a bias in favor of one candidate or proposition or involves the element of scienter, a knowing noncompliance with the law, or a reckless indifference to norms established by law on the part of election officials. Irregularities containing no element of bias, even if they amount to significant deviations from prescribed norms, do not necessarily constitute malconduct. Significant deviations which impact randomly on voter behavior will amount to malconduct if the significant deviations from prescribed norms by election officials are imbued with scienter, a knowing noncompliance with the law or a reckless indifference to norms established by law. Thus, election officials' good faith may preclude a finding of malconduct where bias does not exist. To summarize, if there is a significant deviation from lawfully prescribed norms which results in either bias or involves scienter, knowing disregard for law, or reckless indifference on the part of election officials, malconduct exists. Additionally, where numerous serious violations of law not individually amounting to malconduct cast substantial doubt on the outcome of the vote, the accumulation of individual irregularities may support a finding of malconduct. Minor irregularities and other good faith errors and omissions may not be accumulated to create malconduct.

Once a determination is made that malconduct on the part of election officials exists, the next determination is whether the malconduct was sufficient to change the result of the election. The Hammond court provided a standard to determine whether or not malconduct was sufficient to change the result of an election.

The method used to determine if the malconduct could have changed the result of the election will depend on whether the malconduct injected a bias into the vote. If the bias has tended to favor one candidate over another and the number of votes affected by the malconduct can be ascertained with precision, all such votes will be awarded to the disfavored candidate to determine if the result of the election would be challenged. If the number of votes affected by the bias cannot be ascertained with precision, a new election may be ordered, depending on the nature of the bias and the margin of votes separating the candidates. . . . Where the malconduct has not injected any bias into the

vote but instead affects individual votes in a random fashion, those votes should either be counted or disregarded, if they can be identified, and the results tabulated accordingly. Finally, if the malconduct has a random impact on votes and those votes cannot be precisely identified, we hold that the contaminated votes must be deducted from the vote totals of each candidate in proportion to the votes received by each candidate in the precinct or district where the contaminated votes were cast. . . . Similarly if a specified number of votes should have been counted but are no longer available for counting, they should be added to the vote totals of each candidate in proportion to the votes received by the candidate in the precinct or district in which the votes would otherwise be counted. The invalid votes will be deducted in this pro rate fashion to determine if the malconduct could have affected the result of the election.

SIGNIFICANT DEVIATION FROM STATUTORILY  
OR CONSTITUTIONALLY PRESCRIBED NORMS

Article V, Section 1 of the Alaska Constitution states that every citizen of the United States who meets registration residency requirements and who is qualified to vote may vote in any state or local election. Refusing a qualified voter the right to vote would be a significant deviation from a constitutionally prescribed norm.

AMC 28.40.010(A) states that subject to the requirement that municipal elections be non-partisan, and the remainder of other Anchorage Municipal Code ballot provisions, ballots shall be in the form prescribed by state elections. AS 15.15.030 states the state requirements for preparation of the official ballot. The requirements include specifications such as that the ballot be printed on white paper, the names of the candidates and their party designations be placed in separate sections, that provisions be made for voting for write-in and no party candidates, etc. AS 15.15.140 permits the use of unofficial ballots if the election board receives an insufficient number of official paper ballots, official punch-card ballots, or official election materials. These unofficial ballots may be unmarked substitute ballots or other election materials to indicate the intent of the voter. AMC 28.40.010 requires that a ballot shall be printed on

either paper or card stock and have other standard requirement such as spaces for write-in candidates, the words "yes" or "no" next to each proposition, the words "official ballot" on the ballot with the election date, a facsimile signature of the clerk, etc. AMC 28.40.030 requires the clerk to obtain printing of sample ballots printed on non-white paper labeled "sample ballot".

Xeroxing copies of the official ballot for distribution to voters would not be a significant violation of constitutional or statutory norms. State law would permit unmarked substitute ballots or other materials sufficient to indicate the intent of the voter. Use of sample ballots, xerox copies of official ballots or unmarked substitute ballots sufficient to indicate the intent of the voter would probably not be a substantial violation of statutory or constitutional norms sufficient to rise to a significant deviation for the malconduct standard.

AMC 28.50.120 states that when a voter has qualified to vote, the election official shall give the voter an official ballot. AMC 28.40.020(A) requires the clerk to obtain printing of all ballots for municipal elections. Failure to obtain a sufficient number of official ballots for distribution to voters would probably not rise to the level of a significant deviation of constitutional or statutory norms so long as some form of ballot was available to voters to indicate the intent of the voter.

#### BIAS

An election irregularity which favors one candidate or proposition over another creates a bias in favor of that candidate or proposition. Failure to provide sufficient ballots or turning away voters from polling areas because of insufficient ballots would not have a biased effect on the election. Any effect felt by such irregularities would be random.

#### SCIENTER

The scienter element of the malconduct determination probably would not exist for underestimating the number of ballots needed for the election. However, if voters were turned away and prevented from voting because of inadequate supply of ballots, such conduct could be categorized as reckless indifference to norms established by law. It should be obvious to all election officials that qualified voters cannot be refused the opportunity to vote. If voters were refused the opportunity to vote because of

an inadequate supply of official ballots, the scienter element would probably be established. In Hammond, the court found malconduct on the part of an election official aged 17 who left ballots overnight in his locked car and again in his parked car the following morning because adequate security was not followed.

#### MALCONDUCT

In the present case, if voters were turned away and prevented from voting because of an inadequate supply of ballots based on the above analysis, this would be malconduct because it would be a significant deviation from constitutional or statutory norms imbued with a reckless indifference to the norms established by law. Once malconduct is determined, the next consideration to be made in determining whether an election is invalid is whether the malconduct was sufficient to change the result of the election.

#### SUFFICIENT TO CHANGE THE RESULT

Malconduct by election officials which is sufficient to change the result of an election will invalidate that election and require a new election. Any malconduct in the October 3 election would have a random rather than a biased effect because no ballot issue or candidate would be favored by the inadequate supply of ballots. Additionally, if voters were turned away at the polls and refused the opportunity to vote, the random impact of the malconduct could not be precisely identified. Where malconduct has a random impact on votes and those votes cannot be precisely identified, but it can be determined that a specified number of votes should have been counted but are no longer available for counting, Hammond states that the votes should be added to the vote totals of each candidate in proportion to the votes received by the candidate in the precinct or district in which the votes would otherwise be counted. (If the proportion of votes to be counted to the proportion voted in the precinct or district is so great as to render this method unsuitable based on a statistical approach, they should be counted according to the ratio of votes received in the statewide election. Hammond, p. 260, n. 6.

In the present case, it cannot be determined whether malconduct would have been sufficient to change the result of the vote until specific information identifying the numbers of voters prevented from voting in each of the districts is obtained. If voters in one or more districts were turned away at the polls and prevented from voting because of an inadequate supply of ballots,

it is possible that malconduct could be sufficient to change the result of the election. The following examples are provided as an illustration. Assume two voting districts, District 1 and District 2, each having 100 votes cast on the tobacco tax proposition. If District 1 voted 55 yes and 45 no, and District 2 voted 46 yes and 54 no, and if 100 voters were turned away from the polls in District 2, Hammond would require apportioning the 100 turned-away votes in the same proportion as District 2 voted. This would add 46 yes and 54 no votes to District 2. This result would be sufficient to change a 101 versus 99 vote in favor the tobacco tax to a 147 versus 153 vote against the tobacco tax.

<u>District 1</u>	<u>District 2</u>												
Yes 55	Yes 46												
No 45	No 54												
<table style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="text-align: left;"><u>Yes</u></th> <th style="text-align: left;"><u>No</u></th> </tr> </thead> <tbody> <tr> <td style="text-align: right;">55</td> <td style="text-align: right;">45</td> </tr> <tr> <td style="text-align: right;">+ 46</td> <td style="text-align: right;">+ 54</td> </tr> <tr> <td style="text-align: right;"><u>101</u></td> <td style="text-align: right;"><u>99</u></td> </tr> <tr> <td style="text-align: right;">+ 46</td> <td style="text-align: right;">+ 54</td> </tr> <tr> <td style="text-align: right;"><u>147</u></td> <td style="text-align: right;"><u>153</u></td> </tr> </tbody> </table>		<u>Yes</u>	<u>No</u>	55	45	+ 46	+ 54	<u>101</u>	<u>99</u>	+ 46	+ 54	<u>147</u>	<u>153</u>
<u>Yes</u>	<u>No</u>												
55	45												
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<u>147</u>	<u>153</u>												

Continuing the above illustration, if District 1 voted 45 for and 55 against, and District 2 voted 54 for and 50 against and District 1 had 100 voters turned away from the polls, the effect of the 100 turned-away voters from District 1 would not be sufficient to change the outcome of the election. The 95 versus 105 vote result against the tobacco tax would result in a 140 versus 160 vote against the tobacco tax after calculating the effect of the 100 turn-away voters. Since the result of the election would not be changed, the election would not be invalid.

<u>District 1</u>	<u>District 2</u>
Yes 45	Yes 50
45	
No 55	No 50
55	

<u>Yes</u>	<u>No</u>
45	55
+ 50	+ 50
<u>95</u>	<u>105</u>
+ 45	+ 55
<u>140</u>	<u>160</u>

MUNICIPAL PROCEDURE FOR CHALLENGING ELECTIONS

AMC 28.100 et seq. contains the procedures for challenging a municipal election result. AMC 28.100.010 permits a candidate or ten qualified voters to contest an election. Notice of contest of an election must be submitted in writing to the clerk within five days after the Election Commission has adopted its report of the results of the election. At the Assembly's next regular meeting after filing of the notice of contest, the Assembly must vote whether to hear the contest or to certify the results of the contested election in accordance with the report of the Election Commission. If the Assembly decides to hear the contest, it may appoint one or more persons to take evidence concerning the grounds for the contest and to report to the Assembly. A person may not seek judicial review of an election for any cause or reason unless the person is qualified to vote in the Municipality, has exhausted the administrative remedies before the Assembly, and has filed an appeal before the Superior Court within ten days after the Assembly has finally declared the election results.

Before the Assembly certifies an election result, the Election Commission must meet in public session to declare which absentee and questioned ballots will be rejected and which shall be counted. This public session is called the "canvass". After completion of the canvass, the Election Commission must meet and adopt a report of the results of the ballot review and of the election for submission to the Assembly. (AMC 28.80.050) Pursuant to AMC 28.80.060, "No later than at its next regular meeting after the Election Committee adopts its report, the Assembly shall meet in public session to receive the report of the Election Committee. If, after considering the report, the Assembly determines that the election was validly held, the Assembly shall certify the results of the election in accordance with the report of the Election Commission. The certification shall be the subject of the outcome of any recount under Chapter 28.90 and any election contest under Chapter 28.100."

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SERIOUS VIOLATIONS OF LAW NOT  
INDIVIDUALLY AMOUNTING TO MALCONDUCT

Serious violations of law not otherwise amounting to malconduct may be considered malconduct if they cast substantial doubt on the outcome of the vote. If after investigation it were determined that a variety of serious violations of the law occurred, such circumstances could be used to accumulate the irregularities and support a finding of malconduct. There is no evidence thus far indicating that such serious violations of law occurred during the October 3 election.

MAYOR'S ROLE IN ELECTION CONTESTS

Election contests are regulated by state statute and municipal ordinance. The Mayor has not been given a role in this process. If the Mayor is a candidate in the contested election, he may, as a candidate, contest the election. The Mayor, as a qualified voter, may also join nine other qualified voters to contest the results of an election. The Mayor does not have authority, however, to determine whether the results of an election should be certified by the Assembly or whether the results of an election should be declared invalid. Additionally, the Mayor's veto power would not include the power to veto an Assembly determination to certify the results of an election or that an election was invalid because of a violation of Chapter 28 of the Anchorage Municipal Code.

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